

# Labor Arbitration and Dispute Resolution\*

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There is a widespread perception that our judicial system needs changing. It is expensive, unnecessarily technical, intrusive on private relations, and it gives unfair advantage to the wealthy and powerful. Labor arbitration, by contrast, is frequently pointed to as the paradigm of private justice.

It is understandable that labor arbitration is widely admired. When it functions properly it achieves in an impressive fashion the goals by which any system of dispute resolution should be measured. These are:

(1) *Finality*. Once decided, are cases likely to be retried or appealed?  
(2) *Obedience*. Are the decisions put into effect or are they rendered meaningless by subsequent refusals to carry them out?

(3) *Guidance*. Do the decisions provide necessary guidance to the parties involved in the dispute? Can they subsequently structure behavior in a reasonable fashion and avoid future litigation?

(4) *Efficiency*. Are the majority of disputes settled without a formal hearing? When cases are tried, are the procedures adequate, flexible, and suited to the particular issue? Are the benefits achieved from the system economical compared to the costs?

(5) *Availability*. Is the dispute-resolution machinery routinely available without undue expense to people whose behavior is governed by the system, and are they provided with adequate representation?

(6) *Neutrality*. Do the decisionmakers avoid favoritism and bias for one side or another?

(7) *Conflict Reduction*. Does the entire process, including the adjudication, lead to more amicable relations and contribute to mutual respect among the potential disputants?

(8) *Fairness*. Will the disputes be resolved in a way that appropriately recognizes the interests of the various parties likely to come before the system?

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The perception that labor arbitration successfully achieves these various purposes has led some commentators to the erroneous conclusion that it offers a technique for dispute resolution that can be routinely applied, with only minor adjustments, in other situations.<sup>1</sup> This conclusion, which has been fostered by prominent labor arbitrators and by prestigious groups such as the American Arbitration Association and the National Academy of Arbitrators,<sup>2</sup> overlooks the idiosyncratic nature of labor arbitration and its crucial interrelationship with unionization and collective bargaining.

Collective bargaining shapes labor arbitration and gives it power.<sup>3</sup> The collective-bargaining relationship itself reflects the strength and purpose of unions. It is only when unions are powerful, well established, and responsive to the needs of their members that labor arbitration works successfully.<sup>4</sup> Without unions and collective bargaining, key aspects of labor arbitration would become meaningless or counterproductive. Therefore, proposals to utilize arbitration in various contexts cannot be justified by reference to the labor experience, although the effort to do so is common.

Many of the proposals to utilize arbitration and the articles written in its favor<sup>5</sup> indicate that the authors misunderstand the nature of labor arbitration. They assume that it has been universally successful and that its success is attributable in part to the speed and informality of the process, and in part to the practical expertise of arbitrators.<sup>6</sup> Writers also frequently assume that arbitration differs in a definable way from

1. See, e.g., Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 314-16 (1976); Leffler, *Dispute Settlement Within Close Corporations*, 31 ARB. J. (n.s.) 254, 257-61 (1976).

2. It is remarkable how little criticism of the process and how few doubts concerning its usefulness in other contexts are found within the *Arbitration Journal* published by the AAA or in the *Chronicle* published by the National Academy of Arbitrators. Speeches by AAA officials and AAA pamphlets aggressively sell the process as having something to offer in a variety of circumstances. See, e.g., Coulson, *Annual Report: Responding to a Changing World*, NEWS & VIEWS FROM AM. ARB. A., Jan.-Feb. 1975, at 1, 3-6.

3. Dean Shulman stressed the interrelationship between arbitration and collective bargaining in his oft-quoted statement that "arbitration is an integral part of the system of self-government." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955). Although he stressed the value of arbitration in supporting the process of collective bargaining, he was aware that the support runs both ways. "When [the system of self-government] works fairly well, it does not need the sanction of the law of contracts or the law of arbitration." *Id.*

4. The key role of the union in the process of dispute resolution is recognized and described in Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

5. See note 1 *supra* (citing sources).

6. See Hepburn & Loiseaux, *The Nature of the Arbitration Process*, 10 VAND. L. REV. 657, 659 (1957); cf. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. (n.s.) 13, 15-16 (1965) (expressing concern that arbitration should remain speedier and more economic than litigation).

adjudication or administrative decisionmaking.<sup>7</sup> All of these assumptions are either questionable or inaccurate.

The establishment and legitimation of unions and collective bargaining are responsible for the success of labor arbitration, not vice versa. Labor arbitration can teach us little about the general benefits of procedural innovation; its real lesson concerns the advantages of giving parties greater control over the law to be applied in a certain type of dispute. There may be something to be gained by using similar procedures in other areas, but that cannot be predicted from the success of labor arbitration. This article first discusses the nature of labor arbitration. It then explores the transferability of the labor arbitration model to some of the areas in which its use has been suggested.<sup>8</sup>

## I. Arbitration and Collective Bargaining

### A. *The Value of Formality*

Commentators tend to stress the economy and informality of labor arbitration. Yet, labor arbitration is frequently costly, time-consuming, and formal.<sup>9</sup> This tendency, when noted, is usually deplored, but the formality that labor arbitration fosters can play an important positive

7. See, e.g., Mosk, *Arbitration Versus Litigation*, 7 *ARB. J.* (n.s.) 218, 221-22 (1952); Rehnquist, *A Jurist's View of Arbitration*, 32 *ARB. J.* (n.s.) 1, 2-5 (1977).

8. Arbitration has been advocated as a means of dispute resolution in a wide variety of contexts, including consumer disputes, see Comment, *Nontraditional Remedies for the Settlement of Consumer Disputes*, 49 *TEMP. L.Q.* 385 (1976), family disputes, see Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 *FAM. L.Q.* 22 (1969), medical malpractice claims, see Nocas, *Arbitration of Medical Malpractice Claims*, 13 *FORUM* 254 (1977), prisoner grievances, see Goldfarb & Singer, *supra* note 1, shareholder conflict in close corporations, see Leffler, *supra* note 1, community or citizen disputes, see Symposium, *The Value of Arbitration and Mediation in Resolving Community and Racial Disputes Affecting Business*, 29 *BUS. LAW.* 1005 (1974), attorneys' fees disputes, see Note, *Arbitration of Attorney Fee Disputes: New Direction for Professional Responsibility*, 5 *UCLA-ALASKA L. REV.* 309 (1976), government-contract disputes, see Hardy & Cargill, *Resolving Government Contract Disputes: Why Not Arbitrate?* 34 *FED. B.J.* 1 (1975), and employment disputes in higher education, see Finkin, *The Arbitration of Faculty Status Disputes in Higher Education*, 30 *SW. L.J.* 389 (1976). In all of these articles, the labor experience is used to support the proposal.

9. See Arthurs, *Arbitration: Process or Profession?* in *ARBITRATION—1977*, at 223-24 (B. Dennis & G. Somers eds. 1978) (Proceedings of 30th Annual Meeting NAA) (development of labor arbitration, like that of courts, was from flexibility to formality) [volume hereinafter cited as *ARBITRATION—1977*]; Simkin, *Danger Signs in Labor Arbitration*, in *LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS* 212 (M. Kahn ed. 1964) (Proceedings of 17th Annual Meeting NAA) (citing complaints about increasing costs, formality, and delay in arbitration) [volume hereinafter cited as *LABOR ARBITRATION—1964*]; Straus, *Charges Against and Challenges for Professional Arbitration*, in *LABOR ARBITRATION—1964*, *supra*, at 215-16 (same).

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role in industrial relations. To understand why this is so, it is necessary to understand how arbitration is related to other significant processes in labor relations.

The central process of American labor relations is collective bargaining. Collective-bargaining agreements typically cover wages and working conditions for a period of several years. They are therefore generally lengthy, complex, and ambiguous. Ambiguity may arise because the time pressures involved in negotiation prevent careful drafting, but it may also be intentional; willingness to accept ambiguity permits the parties to agree on a verbal formulation without having to resolve a fundamental difference in approach. In the area of discipline, for example, the parties typically limit the employer to actions supported by "good cause" with full awareness that such a provision delegates the development of appropriate standards to arbitrators.<sup>10</sup> A number of disputes about the meaning of language are therefore inevitable results of a typical agreement.

When an employee or the union feels that rights under an agreement have been violated, a grievance may be filed. Once filed, the grievance is handled by the union through shop stewards and the grievance committee. If pursued, it is dealt with by successively higher levels of management in consultation with their union counterparts.<sup>11</sup>

At each stage, management may affirm its original decision, grant the grievance, or offer to grant it in part. At any stage the union may withdraw the grievance or accept a compromise. If the grievance is not resolved through negotiation, the union has the option of demanding arbitration. Thus, only cases that are not winnowed out by the process of day-to-day negotiation proceed to arbitration. The agreement typically provides a technique for choosing the arbitrator<sup>12</sup> and declares that his decision will be final and binding.<sup>13</sup> Each party pays for his

10. See S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 627, 653 (1960); Shulman, *supra* note 3, at 1006-07. Unions in particular wish to avoid formal agreements regarding discipline standards in order to retain greater flexibility when handling particular discipline cases. Moreover, by disassociating itself from the rulemaking process, the union avoids the unpopular image that it is involved with management in setting disciplinary rules. See S. SLICHTER, J. HEALY & E. LIVERNASH, *supra*, at 628-29.

11. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 120-22, 125-27 (3d ed. 1973); C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* 137 (3d ed. 1970). See generally L. SAYLES & G. STRAUSS, *THE LOCAL UNION* 27-33 (1953) (detailed outline of typical grievance procedure).

12. See W. BAER, *THE LABOR ARBITRATION GUIDE* 22-33 (1974) (discussing typical arbitration agreements); F. ELKOURI & E. ELKOURI, *supra* note 11, at 87-88 (same); C. UPDEGRAFF, *supra* note 11, at 102-07 (same).

13. See A. SLOANE & F. WITNEY, *LABOR RELATIONS* 226 (3d ed. 1977).

own witnesses<sup>14</sup> and representative. The parties share the arbitrator's fees and the expense of the hearing.<sup>15</sup>

The costs in time, money, and dislocation involved in pursuing a grievance to arbitration are such that generally both sides have an incentive to reduce the number of grievances and to settle those that are filed without going to arbitration.<sup>16</sup> The number of grievances can be reduced to the extent that the parties understand the meaning of the contract and try to fulfill their obligations under it. Achievement of these goals in turn can be facilitated by use of standard language in the contract and by recognition of decisions in previous cases at the same or at other companies as binding. In this way, a general body of precedent is established that guides management in administering the contract,<sup>17</sup> guides unions in deciding which cases to bring to arbitration, and guides arbitrators in making future decisions.<sup>18</sup>

The advantages of utilizing precedent make it desirable that arbitrators write opinions. Written opinions also serve to explain to the losing side why it lost and may convince a rejected grievant that he has at least "had his day in court." A written opinion helps to ensure that the arbitrator will consider the opposing contentions and formulate

14. See American Arbitration Association, Voluntary Labor Arbitration Rule 7 (AAA pamphlet, rules as amended effective Jan. 1, 1979).

15. The parties in a typical collective-bargaining arrangement each will have full-time representatives who are available to deal with grievances, to attempt to resolve them, and to prepare cases for arbitration. Arbitrators are chosen either from those known to the parties or from lists of arbitrators submitted by the Federal Mediation Service, the American Arbitration Association, or some other group. At the hearing, the company is generally represented by a lawyer or a member of the personnel staff, unions generally by a business agent but frequently by a lawyer. See F. ELKOURI & E. ELKOURI, *supra* note 11, at 23; C. UPDEGRAFF, *supra* note 11, at 117.

16. The importance of effective settlement and screening techniques is underlined by estimates that a grievance rate of 10 to 20 per 100 employees per year is typical. See Feller, *supra* note 4, at 755 (citing S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 10, at 698). Assuming 20 million employees under collective agreements providing for arbitration, this means two to four million grievances are filed each year, of which probably three-fourths are potentially arbitrable. If a higher percentage went to arbitration than is currently the case, the system might collapse.

17. In particular, management learns what it is obligated to do under the seniority system in making promotions, what procedures to follow in discipline cases, and to what extent it must involve the union in traditional management processes.

18. Theoretically, the doctrine of stare decisis does not apply in labor arbitration, but in fact arbitrators follow precedent at least as carefully as courts do. An example is the "double jeopardy" doctrine in discipline cases, which limits an employer's ability to add to discipline once imposed. Although it does not follow inevitably from the concept of just cause, once established, this precept has been consistently recognized by arbitrators, subject only to common-law-type qualifications concerning suspensions pending final determination and the possibility of separate penalties when an employee's conduct violates two or more rules at one time. See J. GETMAN, LABOR RELATIONS 330 (1978).

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a coherent resolution.<sup>19</sup> It also affords an arbitrator a way to demonstrate his intelligence, fairness, and good judgment, all of which may help him to be chosen in the future.

If past arbitrations are to be used as precedents, the parties to a case must be given the chance to present relevant decisions to the arbitrator. This can best be achieved by writing briefs, which in turn is made easier by having transcripts made of the hearing. The use of briefs and transcripts tends to make the hearing more formal; it also tends to increase the selection of lawyers as arbitrators.

The formal nature of the grievance system encourages greater formality in personnel management. A significant number of arbitration cases deal with the propriety of discipline or discharge.<sup>20</sup> To enhance its chances of winning at arbitration, a company needs to establish careful disciplinary procedures consistent with arbitration awards defining the concept of just cause. Arbitrators generally insist on equal punishment for the same offense, and they require that employees be given advance notice of company rules and a chance to explain their behavior before they are disciplined.<sup>21</sup> This increases the need for a sophisticated labor-relations staff that will respond appropriately to arbitration decisions and creates a disincentive to dealing flexibly with infractions, lest prior leniency be used to prove discrimination in a discharge grievance.<sup>22</sup> The fact that arbitration awards will be carefully analyzed by company and union officials in turn influences the arbitrator to write more carefully.

Thus, at every stage of the process, there are factors enhancing the value of formality and legalism and making the additional time and expense associated with these characteristics worthwhile. Efforts to

19. See A. SLOANE & F. WITNEY, *supra* note 13, at 237-38. But see Vladeck, *More Effective Use of Arbitration*, in NEGOTIATION-ARBITRATION '72, at 191 (1972) (Proceedings of Seminar on Collective Bargaining) (arguing for memorandum opinions rather than long, written opinions) [volume hereinafter cited as NEGOTIATION-ARBITRATION '72].

20. A survey of issues in cases decided by Federal Mediation and Conciliation Service (FMCS) arbitrators during 1977 revealed that of 6,935 issues identified, over one-third (2,520) were classified as discharge and discipline issues. 30 FMCS ANN. REP. 43-44 (1977) (Table 24).

21. See Combustion Eng'r, Inc., 42 Lab. Arb. 806 (1964) (Daugherty, Arb.) (outlining procedures required by concept of just cause); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 502-03 (1976); cf. Getman, *What Price Employment? Arbitration, the Constitution, and Personal Freedom*, in ARBITRATION—1976, at 62 (B. Dennis & G. Somers eds. 1976) (Proceedings of 29th Annual Meeting NAA) (analogizing arbitrator's role in enforcing employee's procedural rights to that of court enforcing criminal defendant's procedural rights) [volume hereinafter cited as ARBITRATION—1976].

22. See Feller, *supra* note 4, at 766-67.

reverse these trends thus far have largely been unsuccessful, because the trends are responsive to the goals of guidance and efficiency.<sup>23</sup>

### B. *The Contribution of the Private Aspects of Labor Arbitration*

Labor arbitration is a mixture of public and private, voluntary and compulsory features. The private aspects include the source of the rules being applied and the parties' control over the selection and payment of arbitrators. These private and voluntary features support, and are supported by, the system of collective bargaining. They help ensure the neutrality of arbitrators, the availability of the process, the fairness of the decision, as well as obedience to awards sustaining grievances; sometimes they also serve to reduce labor-management conflict. Thus, the success or failure of labor arbitration in various significant respects is determined by the nature of the relationship the parties establish and by the power of the union.

#### 1. *The Collective-Bargaining Agreement and Fairness*

The labor arbitrator's source of authority is the collective-bargaining agreement. Almost all labor contracts limit the employer's ability to discharge employees, provide for the use of seniority in the grant of benefits and in layoff situations, and protect the work jurisdiction of the union members in various ways.<sup>24</sup> These clauses provide the substantive underpinning that makes an arbitrator's decision acceptable to the employees. When agreements are deemed particularly one-sided, harassment, wildcat strikes, and various other types of conflict frequently occur.

#### 2. *Finality and Obedience*

The costs of litigation and the unsettling impact of continuous disagreement over labor relations act as incentives to both sides to treat disputes as resolved once the arbitrator has spoken. In addition, the fact that awards frequently represent compromises, as well as the feeling that awards are likely to be equalized over the long run and that

23. Responding to complaints about delays, a prominent arbitrator, Ralph Seward, commented: "For a time, at least—and possibly for a long time—our decisions will be the binding law in your plants. One thing you should therefore be in a position to insist upon is high quality in those decisions; and high quality comes at a price—in time, at the very least." Seward, *Reexamining Traditional Concepts*, in *LABOR ARBITRATION—1964*, *supra* note 9, at 243.

24. See, e.g., R. FLEMING, *THE LABOR ARBITRATION PROCESS* 136-42 (1965); J. GETMAN, *supra* note 18, at 180-89; S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 10, at 104-39, 244-79, 624-62.

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erroneous awards can be dealt with through negotiation, all have contributed to the common labor-relations practice of routinely obeying awards, even those that the losing side considers erroneous.<sup>25</sup> This practice developed well before it became legally difficult to upset an arbitrator's award.<sup>26</sup>

Similarly, the fact that arbitration awards favorable to employees are routinely obeyed is partly attributable to the way the collective-bargaining agreement provides protection against the use of discretion as a form of reprisal. For example, if the arbitrator orders an employee's reinstatement, management cannot provide him with inferior wages or working conditions without violating the seniority clause or his job description.<sup>27</sup> Moreover, reprisal would make the union more intransigent in settling grievances and would lead to the filing of new ones. The employer who sought to undercut the agreement might also be faced with protest strikes.

### 3. *Conflict Reduction and Efficiency*

The existence of a grievance procedure provides a union with a technique for putting relatively inexpensive pressure on management. If there are a great number of grievances pending at one time, management personnel will be occupied with grievance resolution and distracted from their other functions. Employees or witnesses will be taken away from their normal tasks to be interviewed or perhaps called in on meetings. If the validity of plant rules is called into question, a decision must be made whether to suspend their operation or risk additional grievances.

The involvement of union personnel at the lower levels will not be particularly troublesome to the union since grievance processing is a primary union function.<sup>28</sup> If a large union and small employer are

25. The customary response to an award considered offensive by one or both parties is not disobedience, but a refusal to employ the offending arbitrator in the future.

26. The enforceability of awards was not established until 1960 in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), but many thousands of awards had been issued and obeyed before that decision. See generally R. FLEMING, *supra* note 24, at 15-21 (describing widespread acceptance of arbitration in post-World War II period); S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 10, at 747 (describing growth of arbitration and concluding that "[w]ith rare exceptions the acceptance of grievance arbitration has ceased to be an important issue in negotiations").

27. See S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 10, at 104-15 (discussing areas in which seniority applies).

28. Professor Summers has written that the grievance process is integrally related to the contractual bargaining process, and in effect completes the collective agreement. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362, 389-92 (1962). Several authors have characterized the arbitration process as a tactic



involved, the union can rely on its national staff and will therefore have much greater resources to throw into the battle. It is for this reason that when a strong and responsive union represents employees, the existence of grievance machinery is likely to create an incentive for the employer to get along with the unions and not make each issue a battle of wills.

When the parties have been negotiating and resolving disputes over a long period of years, a spirit of cooperation may develop in handling grievances. In such cases union and management settle into a relationship of reciprocal legitimation in which the benefits flow from the general relationship established, rather than from arbitration itself, which is then rarely necessary. The grievance machinery can serve as an aid to management, because the shop steward or grievance committee will recognize and certify the legitimacy of appropriate instructions. Management's reliance on the union for this purpose in turn reaffirms the union's key role in the plant. Some scholars suggest that the grievance machinery serves as an aid to productivity when cooperative relations are established.<sup>29</sup>

#### 4. *Availability*

Under the typical collective-bargaining agreement, the union controls both the lower-level bargaining and the presentation of the case in arbitration.<sup>30</sup> As a result, the successful functioning of the system turns on the expertise, resources, and integrity of the union. If the grievance committee is not familiar with the contract, it will not encourage the filing of needed grievances, nor will it know which ones

used to improve the union's collective-bargaining position. See, e.g., R. FLEMING, *supra* note 24, at 203-04; A. SLOANE & F. WITNEY, *supra* note 13, at 225.

In order to meet the conflicting goals of screening complaints and effectively representing their members, unions can sometimes use strong grievances to get the company to compromise on relatively weak ones. The filing of grievances and the settlement and arbitration processes are interrelated. The union may go to arbitration in order to exert bargaining pressure and force more favorable settlements in later cases. See generally J. KUHN, *BARGAINING IN GRIEVANCE SETTLEMENT* (1961) (analyzing effect of grievance-resolution processes on industrial relations); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 43-46 (discussing interdependence of arbitration and other union activities).

29. See, e.g., D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 266 (1970) (grievance procedures can improve morale; "net effect of collective bargaining is to increase productivity"); L. SAYLES & G. STRAUSS, *supra* note 11, at 22 (grievance procedure not just "a purely negative method of appeal against management," but "a continuous process of problem solving"); cf. Brown & Medoff, *Trade Unions in the Production Process*, 86 J. POLITICAL ECON. 355 (1978) (econometric data show positive impact of unionization on productivity).

30. See F. ELKOURI & E. ELKOURI, *supra* note 11, at 125-29; L. SAYLES & G. STRAUSS, *supra* note 11, at 27-33.

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should be traded off. Substantial resources are generally required to pay for arbitration and to hire professional counsel when necessary. An unresponsive leadership may, through inadvertence or ill will, fail to process meritorious grievances that are important to individuals or groups within the union. If the union lacks the support of its members, it will be unable to enforce favorable awards and unable to moderate the impact of unfavorable ones at the bargaining table. Finally, a weak union will not be able to negotiate the standard provisions that provide job protection and ensure the use of seniority.

### 5. *Arbitration and Industrial Peace*

When labor relations are unsatisfactory, the existence of arbitration may actually exacerbate bad feelings.<sup>31</sup> In such circumstances the jurisprudence of arbitration encourages management to enforce discipline for all offenses to avoid providing arbitrators with a reason for mitigation. The union responds by filing numerous grievances that are regularly denied in the lower steps. The union is forced to go to arbitration frequently, which causes a backlog with concomitant delays in hearing and disposition. The hearing is pervaded with an atmosphere of hostility; it provides the parties with an additional opportunity to berate each other. Conflicts and wildcat strikes are provoked when management takes a disciplinary action or denies a grievance, when arbitration is delayed, or when one of the parties considers an arbitrator's decision unacceptable. All of this makes the grievance machinery a cause of further tension.<sup>32</sup>

31. See R. FLEMING, *supra* note 24, at 203-04 (union may use arbitrations in battle against employer); A. SLOANE & F. WITNEY, *supra* note 13, at 225-26 (arbitration process politicized by both parties to obtain bargaining advantage).

The author was a permanent umpire in one institution in which relations had so deteriorated that the union filed a grievance about management's refusal to compromise grievances.

32. Of course, such situations cannot be the rule or the parties would reject arbitration. Arbitration is provided for in over 94% of collective agreements. U.S. BUREAU OF LABOR STATISTICS DEP'T OF LABOR, BULL. No. 1425-6, *ARBITRATION PROCEDURES* (1966). This fact, however, does not provide a total measure of its overall success. To some extent the prevalence of arbitration reflects the lack of acceptable alternatives and the potential usefulness of arbitration in achieving productivity when relations are acceptable. See note 29 *supra*. Unions want an external check on management. It would be costly to bring suit each time they believed management violated the agreement, since this would require the constant use of lawyers and courts. Moreover, for various economic, historic, and ideological reasons, unions seek to minimize the use of these institutions. Regular strikes would be tumultuous and costly. The NLRB does not have jurisdiction over most breaches of contract. Of course, if unions were totally dissatisfied with arbitration they might agitate for special courts, but special courts would require a reversal of labor's historic distrust of government involvement and would be unlikely to solve the problems that unions experience with the grievance machinery. Besides, the fact that arbitration offers another technique for exerting bargaining pressure makes it at least as attractive, from a

The extent to which arbitration has contributed to reducing industrial strife is therefore unclear. It is generally assumed that arbitration makes resort to self-help unnecessary,<sup>33</sup> but it is impossible to demonstrate this statistically on the basis of available data. Strikes during the term of collective agreements are still quite common.<sup>34</sup> In any case it would be a mistake to attribute to arbitration a favorable impact on labor relations independent of the basic collective-bargaining relationship.

C. *Private Selection and Control and its Impact on Efficiency, Fairness, and Neutrality*

Collective-bargaining agreements are enforceable in federal or state courts.<sup>35</sup> Yet the parties prefer to utilize arbitration because of its obvious advantages over traditional adjudication in terms of speed, convenience, and flexibility.<sup>36</sup> It would be possible, however, to reduce or eliminate the advantages of arbitration in a variety of ways. Grant-

union's perspective, as other means of adjudication. Thus, it is easy to see why arbitration is liked by unions, whether or not it reduces strikes.

From management's perspective, the issue is more doubtful. If arbitration does not reduce strikes but instead gives the union a new source of pressure, why would management accept it so routinely? The fact that management regularly accepts arbitration does not mean that management always favors it. Provision for union security and limits on discipline, work assignment, and promotion, when lawful, are pervasive in collective agreements not because they are desired by management, but because they are sufficiently important for the union to insist on them as a precondition to agreement. The union will moderate other proposals to achieve such provisions. In addition, for management, most other techniques of dispute resolution have substantial drawbacks: court cases may be costly and may involve long delays during which the law of the shop may be confused; agencies or special courts involve government interference or oversight of managerial decisionmaking. Arbitrators partial to employers can be carefully selected and their role at least partially controlled. Moreover, if the parties do not pay for the dispute-resolution mechanism, the union may be motivated to pursue many more grievances.

33. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.")

34. Wildcat strikes are characteristically of short duration, and data from the Bureau of Labor Statistics indicate no significant decline in the incidence of short strikes (those lasting from one full day or shift through three full days) between 1941 and 1959. See J. KUHN, *supra* note 28, at 54 (Table 1). Representatives of major industries, however, contend that many more short, illegitimate walkouts occurred than were reported by the Bureau. See *id.* at 53-57.

35. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-99 (1960) (arbitration awards enforceable in federal courts); UNIFORM ARBITRATION ACT §§ 11-14 (adopted in 22 jurisdictions) (enforceability in state courts).

36. Cf. R. FLEMING, *supra* note 24, at 13, 18 (proportion of agreements providing for arbitration as final step in grievance procedure increased from 8-10% in 1930s to 73% in 1944, 83% in 1949, and 89% in 1952); A. SLOANE & F. WITNEY, *supra* note 13, at 226 (96% of U.S. labor agreements provide for arbitration as final step in grievance procedure).

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ing the NLRB jurisdiction over breaches of collective-bargaining contracts would reduce most of the direct costs to the parties and almost all costs to the successful grievant; it would thus eliminate the possibility that a meritorious grievance will not be heard because it is too expensive.<sup>37</sup> It would be impossible, however, for the NLRB to function as an arbitrator because NLRB procedures differ fundamentally from those involved in labor arbitration. The entire process is controlled by the agency. Once a complaint is filed, the parties control neither the investigation nor the presentation of the case.<sup>38</sup> They do not choose the judge, and they cannot select the procedures.<sup>39</sup> Thus, although use of the Board's processes might provide for a more careful investigation, it would differ greatly from the system of private grievance bargaining that is so crucial an aspect of current labor relations and that has been so significant in establishing the role of unions in the plant.<sup>40</sup>

Many of the features of labor arbitration could be incorporated in a system of special courts.<sup>41</sup> What would inevitably change in an official system is the process of private selection and payment of the arbitrator.<sup>42</sup> The consequences of this change, however, are not obvious, nor is its desirability. If, as commentators have argued, arbitral independence from the parties is essential to the integrity of the pro-

37. NLRB control over grievances would also substantially reduce the need for union support for the grievant. This would help to prevent union incompetence and ill will from harming the grievant's case, but it would also partially undercut the role of the union.

38. See F. McCULLOCH & T. BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD* 85-87 (1974); B. MELTZER, *LABOR LAW* 96-98 (2d ed. 1977) (complaint is prosecuted by NLRB attorney from regional office; charging party may intervene and participate, but such participation is discouraged).

39. See B. MELTZER, *supra* note 38, at 96-98 (describing NLRB procedure).

40. Cf. Levine, *Compulsory Dispute Settlement via Litigation: The Rhodes Labor Court Proposal*, 27 *ARB. J.* (n.s.) 169, 169-70 (1972) (persistent opposition to compulsory arbitration stems from notion "that any government intervention shall be voluntarily agreed upon by the parties concerned and that acceptance of the findings or recommendations of an outside party shall be optional unless the union and employer have agreed voluntarily in advance to accept the decision of an impartial arbitrator").

41. Although the basic features of arbitration could be matched by legislatively established labor courts, these courts would inevitably be less flexible. It would be difficult, indeed almost administratively impossible, to set up a public system of courts that would provide decisionmakers on whatever terms the parties chose. Once the government's money was being spent, safeguards would be necessary to prevent financial abuse in terms of fees and hours, and selection methods would have to be provided. The forms of opinions would inevitably be controlled, and limitations on how the arbitrator could go about deciding cases would inevitably arise. Thus, a switch to government-provided processes would mean a reduction in flexibility.

42. It is difficult, but not impossible, to imagine a governmental system in which the parties could choose their judges from a list of names supplied, and each side could reject successive panels. Even if the parties were given the right to select special judges, though, it seems farfetched to imagine special judges whose government salary would depend on the selection decisions of particular parties.

cess,<sup>43</sup> then it would follow that protection against reprisal by the losing side should be afforded to the arbitrator.<sup>44</sup> Judge Paul Hays, in his famous Storrs Lectures,<sup>45</sup> castigated the arbitration process because of the arbitrator's financial dependence on the parties.<sup>46</sup> Hays argued that the proper model for arbitration was a strict judicial one:

The fact of the matter is that arbitration cases ought to be decided in much the same manner as any other controversy in which violation of a contract is alleged. The process of decision in arbitration demands of the arbitrator much the same skills that a judge uses when he is deciding a contracts case.<sup>47</sup>

Hays argued that arbitrators frequently fail to live up to this standard because they are financially dependent on the parties they judge. Hays disagreed with the majority view not about how arbitrators should act, but about how they behave in fact. The arbitrators who responded to Hays, and there were many,<sup>48</sup> disagreed strongly with his description of the process; few, if any, objected to his equation of the judicial and arbitral role. Only a few commentators suggested that Hays might have had a point in assuming that arbitrators decide cases so as to further their own acceptability.<sup>49</sup> Those who have taken this position have largely condemned or deplored this influence.<sup>50</sup> In none of the literature is it suggested that an arbitrator's desire to promote acceptability might affect the process in a way that is basically desirable.

However, if, as I contend, economic efficiency is promoted by arbitration partly because through it the parties conclude their negotiations,<sup>51</sup> then it is likely that the desire to maintain acceptability plays

43. See, e.g., P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 40-42 (1966); Fuller, *Collective Bargaining and the Arbitrator*, in *COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE* 33 (M. Kahn ed. 1962) (Proceedings of 15th Annual Meeting NAA); Summers, *supra* note 28, at 370.

44. At least one commentator thinks such protection is the answer and has proposed a lottery selection process to effect it. See Silver, *More Effective Use of Arbitration*, in *NEGOTIATION-ARBITRATION* '72, *supra* note 19, at 197.

45. P. HAYS, *supra* note 43.

46. *Id.* at 37-75.

47. *Id.* at 42.

48. See, e.g., Aaron, Book Review, 42 WASH. L. REV. 976 (1967) (reviewing P. HAYS, *supra* note 43); Meltzer, Book Review, 34 U. CHI. L. REV. 211 (1966) (same). See generally Getman, *The Debate over the Caliber of Arbitrators: Judge Hays and His Critics*, 44 IND. L.J. 182 (1969).

49. See, e.g., R. FLEMING, *supra* note 24, at 209-10; Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, in *NEGOTIATION-ARBITRATION* '72, *supra* note 19, at 146.

50. E.g., Meltzer, *supra* note 49, at 146; Silver, *supra* note 44, at 197.

51. See notes 28 & 32 *supra*.

When the parties have in fact reached agreement concerning how a matter should be handled, the arbitrator's function is, of course, to recognize and give effect to their agreement. This is true both when the parties have specifically agreed and when they have used language that has a fairly well-established meaning.

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a useful role in helping to achieve the resolution that the parties would have achieved had they had the opportunity to negotiate with respect to the issues in dispute. Such a resolution would by definition further the goal of efficiency.

The negotiating process reflects both the relative economic strength and the differing priorities of the parties. A typical agreement will provide special protection for union officials, because this matter is of considerable importance to the union and a matter of relative indifference to the employer.<sup>52</sup> Matters such as shift scheduling, which are of importance to a company's effective functioning, are stated to be the sole responsibility of management. Economic strength is necessarily a factor in arbitration because it shapes the language of the collective-bargaining agreement, which is always the starting point, and sometimes the sole basis, for the arbitrator's decision. The parties' priorities are more difficult to ascertain. The arbitrator must pay careful attention to the clues that the parties give concerning how strongly they feel about a particular case. My judgment is that the need to maintain acceptability makes arbitrators more attentive to such clues than judges and more likely than judges would be to utilize them in their decision.<sup>53</sup> Arbitrators whose decisions over time accurately reflect the priorities of the parties are likely to maintain and enhance their acceptability more than arbitrators who take either a more narrowly judicial role or a more personally activist role. Thus, the process of selection will tend to produce arbitrators and a body of arbitral precedent that facilitate and extend the process of negotiation.<sup>54</sup>

The desire to maintain acceptability makes it important for arbitrators not to project either a pro- or anti-union bias. As a result, this

52. Cf. J. GETMAN, *supra* note 18, at 180 (clauses giving union officials time off with pay and superseniority commonly part of union proposal); S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 10, at 22-23 (management solicitude for union officers).

53. This judgment, although difficult to prove, has been supported by experienced labor attorneys with whom the author has discussed the matter. Indeed, several report that planting commitment clues is a significant part of their litigation strategy. The impulse to consider such clues has been acknowledged in private discussion by several prominent arbitrators. The power of the impulse is partly demonstrated by the prevalence of the practice of splitting awards. In reading through arbitration cases for inclusion in a text, I was struck anew by the prevalence of this practice. See J. GETMAN, *supra* note 18, at 287-97. A graphic illustration of the power of party attitudes to shape awards was given by former Labor Secretary Willard Wirtz, who described his "pang of conscience felt one day in the middle of a discharge hearing" when he "realized that [he] wasn't listening to what the grievant was saying—because it had already become obvious that an award of reinstatement without back pay would be 'acceptable' to both the company and the union." Wirtz, *Due Process of Arbitration*, in *THE ARBITRATOR AND THE PARTIES* 1 (J. McKelvey ed. 1958) (Proceedings of 11th Annual Meeting NAA).

54. The parties devote considerable effort to selecting an arbitrator whom they think will be most favorable to them. Companies keep lists of arbitrators, which contain performance evaluations and remarks by other lawyers and company representatives. Unions have a less formal but frequently no less intense method of evaluation.

desire serves to insulate the process from personal political attitudes and to prevent it from reflecting changes in governmental policies toward labor, as is characteristic of the NLRB. Because labor relations are a fierce political battleground, each side should feel that it is getting an adequate hearing on the merits in arbitration regardless of political fluctuations.

The careful selection process also motivates arbitrators to try to please both sides, if possible, with their decision. Thus, the split award and the decision in which it is difficult to tell which side has won are frequent in labor relations. Although the parties constantly insist it is contrary to their wishes, this system of giving a little bit to each side permits the process to achieve the results of successful negotiation.

The selection process thus helps arbitration to achieve neutrality and, together with the collective agreement, fosters fairness and promotes conflict reduction. These results, when noted, are sometimes mistakenly attributed to arbitral "expertise." One does not have to accept Judge Hays's unflattering view of arbitrators to be suspicious of this explanation. It is difficult to explain how arbitrators generally can lay claim to special knowledge about industrial relations. Most arbitrators do not have prior management experience, and they are most unlikely to have been union officials. They rarely have experience working at the jobs about which they are deciding.<sup>55</sup> Indeed, the selection process discourages people with practical experience in labor relations, since anyone identified with one side is likely to be unacceptable to the other. Academic experience or work as a neutral party with the NLRB or some other decisionmaking agency is common,<sup>56</sup> but these backgrounds do not provide knowledge of the day-to-day realities of labor relations. Such experience is, in fact, quite similar to the experience of judges before serving on the bench.<sup>57</sup>

55. See note 57 *infra*; Coulson, *Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified? Dead Horses Ride Again*, in *ARBITRATION—1977*, *supra* note 9, at 178. Biographical sketches of some arbitrators are included in the index to the *Labor Arbitration Reports* series. See, e.g., 51-60 *LABOR ARBITRATION CUMULATIVE DIGEST AND INDEX* 577 (1974).

56. W. BAER, *supra* note 12, at 14-15.

57. See Feller, *The Coming End of Arbitration's Golden Age*, in *ARBITRATION—1976*, *supra* note 21, at 99 ("It is certainly not true that arbitrators have a competence in their special field that exceeds the competence of other specialized adjudicators in our legal system.") Of course, arbitrators can gain some understanding of industrial relations by arbitrating disputes, but the learning is distorted by the adversary process. The author's experience as an arbitrator has not shown this learning to be particularly helpful in writing knowledgeable opinions. Indeed, one study indicates that third-year law students were likely to arrive at the same result as experienced arbitrators in discharge, discipline, and contractual interpretation cases. See R. FLEMING, *supra* note 24, at 80-83.

Although both the courts and the NLRB have shown great deference to the ability of

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Thus, those factors that could not easily be replicated by official governmental processes help labor arbitration to meet the needs of the collective-bargaining process of which it is a part. Because labor relations is an important field in which both sides have considerable financial investment, the expense of arbitration is acceptable. Indeed, it is a relatively cheap way to police the collective agreement and make it generally workable.<sup>58</sup> However, in other situations unrelated to collective bargaining, many of these same features would promote inefficiency and might impair the prospects for arbitral neutrality. For parties with limited bargaining power, who cannot afford to pay for arbitrators and do not have access to other enforcement machinery, a system more like agency adjudication than labor arbitration would generally be preferable.<sup>59</sup>

### D. *Arbitration and Adjudication*

The current surge of interest in arbitration reflects widespread disenchantment with government. Arbitration is seen by some as an attractive alternative to government-sponsored adjudication, with which it is frequently contrasted.<sup>60</sup> It is impossible, however, to consider the relative merits of arbitration and adjudication in the abstract. Arbitra-

the arbitrator, *see, e.g.*, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837, 839 (1971), there is nothing to suggest that arbitrators are more effective than judicial or administrative decision-makers. In general, the Board's factfinding procedures may be superior. *See Getman, Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 IND. L.J. 57, 60-61 (1973). Representatives of union and management alike have questioned the competence of arbitrators. *See Jones & Smith, Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1146 (1964) ("Almost without exception our respondents take the view that the arbitration process would be improved if arbitrators were more competent.")

58. Although the rising cost of arbitration has long been a matter for concern, *see R. FLEMING, supra* note 24, at 31 (written in 1965), the costs of arbitration still compare favorably with those of the major alternatives: litigation and strikes, *see Hepburn & Loiseaux, supra* note 6, at 659. *But cf. Benar, Woes of a Newcomer Neutral*, 27 ARB. J. (n.s.) 186, 187 (1972) (some arbitrators take six months to reach decision and charge \$300 or more per diem).

59. In many of the areas in which use of arbitrators has been suggested, government-appointed decisionmaking would not present the same potential dangers as it would in the labor context. Moreover, although arbitration is billed as less costly than official public systems, there is no reason why this has to be so. When the parties provide their own representatives and pay for their own judges, the reverse may be true. In labor relations, because both sides have representatives already hired for negotiating and enforcing the agreement, the presentation of cases in arbitration is more effective and less costly than it would be if representatives were retained on an ad hoc basis, as they would be in other areas.

60. *See, e.g., Landes & Posner, Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).



tion has no unique procedural aspects, and the two processes are frequently indistinguishable.

Traditional definitions of arbitration focus on the private status of arbitrators. For example, *Black's Law Dictionary* defines arbitration as "[t]he submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement."<sup>61</sup> This definition, however, is outdated. Arbitrators today are frequently public officials. They are sometimes appointed and paid by the state.<sup>62</sup> Statutes generally give them such formal judicial powers as the right to issue subpoenas and administer oaths.<sup>63</sup> They regularly interpret and apply statutes or common law.<sup>64</sup> Arbitration decisions that are not obeyed will be routinely enforced by the courts, frequently with less rigorous review than that applied to formal agency decisions.<sup>65</sup>

It is also incorrect to define arbitration by the contractual or voluntary basis of the arbitrator's jurisdiction. Arbitration is frequently

61. BLACK'S LAW DICTIONARY 134 (4th ed. 1968).

62. Two states that provide such a service are Connecticut and California.

Connecticut maintains panels of union, employer, and neutral arbitrators. A tripartite panel is provided free of charge to those parties agreeing to arbitrate through the Board of Mediation and Arbitration. The employee or his representative is permitted to designate a labor member of the Board to serve on the arbitration panel, and the employer may choose an employer representative. The third member is the Chairman, or, if he is unable to serve, the Deputy Chairman of the Board. The state compensates the arbitrators from state funds at a statutorily fixed rate. CONN. GEN. STAT. §§ 31-91 to -100 (1979).

In California, cases filed in Superior Court can be referred to an arbitrator, compensated from public funds, when both parties agree or on the election of the plaintiff if he is willing to stipulate to an award of less than a certain sum. See CAL. CIV. PROC. CODE §§ 1141.10, .20 (West Supp. 1979) (repealed effective July 1, 1979, to be replaced by more detailed provisions, CAL. CIV. PROC. CODE §§ 1141.10-.32 (West Supp. 1979)).

63. See, e.g., 9 U.S.C. § 7 (1976) (arbitrators can compel attendance of witnesses and production of documents); UNIFORM ARBITRATION ACT § 7 (enacted in 22 jurisdictions) (same; power to administer oaths).

64. Both Pennsylvania and California provide for the arbitration of certain civil suits. Pennsylvania law provides that, when prescribed by rule of court, most civil cases or issues therein, in which the amount in controversy is less than a certain sum, shall first be submitted to a board of three local members of the bar for arbitration. All other cases or issues therein may be referred to an appointed judicial officer or other person by agreement of both parties. PA. CONS. STAT. ANN. §§ 7361-7362 (Purdon Supp. 1978). For a description of earlier Pennsylvania arbitration statutes, see Comment, *Compulsory Arbitration in Pennsylvania—Its Scope, Effect, Application, and Limitations in Montgomery and Delaware Counties—A Survey and Analysis*, 2 VILL. L. REV. 529 (1957). The California statute is summarized in note 62 *supra*.

65. Compare *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("A mere ambiguity in the [arbitrator's] opinion . . . which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.") with *Camp v. Pitts*, 411 U.S. 141, 143-44 (1973) (administrative findings must be sustainable on record made). The NLRB has also adopted a policy of deference to arbitrators' decisions, see *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837, 839-43 (1971), which has been recognized by the Supreme Court, see *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-17 (1974).

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required by law for those who wish to have some legally recognized right enforced. Even garden-variety labor arbitration has many public and compulsory aspects.<sup>66</sup> Moreover, proposals to utilize arbitration in new situations tend to minimize the private aspects of the process. Since the advantages of having the parties share the costs of arbitration are largely unique to labor arbitration, and since many of the groups to be covered by new forms of arbitration could not afford to pay arbitrators' fees, this feature of labor arbitration is unlikely to spread. It is noteworthy that in almost all of the areas of current experimentation with arbitration, the arbitrator is provided free of charge and without elaborate procedures for selection.<sup>67</sup> Proposals for the extension of arbitration tend to contrast it with a rigid model of adjudication, but such techniques as court-appointed masters, special courts, and informal agency decisions offer varying degrees of flexibility, speed, and informed judgment. Such processes do not require relatively equal parties and can be financed out of general revenues.

### E. *Summary: Union Organization as the Essential Element in the Success of Arbitration*

Disparities of power in the relationship that is the focus of a dispute are bound to be reflected in the mechanism used to resolve the dispute. When labor arbitration has been successful, it is because collective bargaining has established a rough equality and mutual respect between the parties. The key to changes in labor relations has been the pervasive role of the union in promulgating and administering rules, and not in

66. It is common for the parties to select arbitrators from a list of names submitted by either a state agency or the Federal Mediation Service. To have one's name listed requires an official determination of suitability as an arbitrator. See Barreca, *Comment*, in *ARBITRATION—1977*, *supra* note 9, at 193. The arbitrator's powers to issue subpoenas and administer oaths are two other indications of his official status.

In negotiating a labor agreement, management is compelled to include an arbitration clause if it wants to obtain an injunction against a wildcat strike. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253-55 (1970). The union is frequently compelled under existing NLRB doctrine to arbitrate when it prefers to submit a dispute to the Board. See, e.g., *Collyer Insulated Wire Co.*, 192 N.L.R.B. 837 (1971). The grievant whose case is being heard is never given the choice of having his case heard by another tribunal such as a court, or a federal or state agency. Professor Feller recognizes and deplores the increasingly public nature of labor arbitration, because he feels this process is inconsistent with the central role of collective bargaining in successful labor arbitration: "to the extent that the collective agreement is diminished as a source of employee rights, arbitration is equally diminished." Feller, *supra* note 57, at 109. But cf. Bloch, *Some Far-Sighted Views of Myopia*, in *ARBITRATION—1977*, *supra* note 9, at 233-42 (calling for increased awareness on part of arbitrators of existing statutory framework).

67. The AAA is currently experimenting with arbitration in community affairs, prisons, Indian affairs, and energy. Arbitrators are neither chosen nor paid by the parties in any of these situations. Telephone Interview with Gerald Aksen, Esq., Gen. Counsel AAA (Nov. 27, 1978).

the establishment of a particular system of dispute resolution. When unions are powerful, the form of grievance mechanism may vary, but it will reflect the essential nature of the relationship.

The intimate relationship between labor arbitration and collective bargaining makes its value as a precedent for dispute resolution in other contexts doubtful. The remainder of this essay will consider two areas in which labor arbitration has been proposed as a model and suggest why, in order to be successful, any system of dispute resolution established in these areas would have to be very different from labor arbitration. Even if it were successful, moreover, such a system would not achieve the same goals as labor arbitration.

## II. The Efforts to Transfer Labor Arbitration to New Situations

### A. *Nonunionized Employment*

In a valuable recent article, Professor Clyde Summers suggests legislation to provide job security for nonunionized workers.<sup>68</sup> His goal is to create a system for these workers that closely approximates that currently existing in the unionized sector; to do so, he suggests legislating a "good cause" standard for dismissals, together with state-provided arbitration.<sup>69</sup> He argues that "legal protection against unjust dismissal can best be built upon the standards and procedures of our existing arbitration system"<sup>70</sup> and suggests that "[a] statute so structured would give employees not covered by collective agreements substantially the same protection as that now enjoyed by employees covered by collective agreements."<sup>71</sup>

Although the goals of the proposal are worthy, the obstacles to their achievement would be formidable. In the absence of a union the goals of obedience, availability, finality, neutrality, and efficiency would be difficult to achieve without considerable restructuring of the process.

#### 1. *Obedience*

As Professor Summers points out, obedience would be a problem because absence of a collective-bargaining agreement makes subterfuge possible in management's imposition of penalties.

68. Summers, *supra* note 21, at 519-31.

69. See *id.* at 521. Under the Summers plan, the state would provide arbitrators when the parties failed to agree, and the state would pick up some—perhaps most—of the costs involved. *Id.* at 521-22. Summers believes the arbitration system currently employed by unions provides a model for protection of nonunion workers because it has established workable principles and procedures, and because the term "'just cause' . . . already has been given content by thousands of arbitration decisions." *Id.* at 521.

70. *Id.*

71. *Id.* at 523.

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The statutory protection will be of limited value if the employer only needs to wait until he can combine disciplinary action with economic adjustments, but the employer also must be free to make the needed adjustments without being vulnerable to charges of discipline by subterfuge. When there is a collective agreement, this causes few problems because decreases or other adjustments in the work force are largely governed by seniority provisions, and the objective character of seniority removes any claim that action is being taken against an individual for punitive purposes.<sup>72</sup>

Professor Summers's solution is to require that the employer utilize "some objective standard" that might include "factors of age, training, breadth of skill, past productivity, and family responsibilities, so long as the factors are relevant, capable of objective measurement, and systematically applied."<sup>73</sup>

It is not easy to comprehend how the proposed system would work. Presumably, nonunionized employers would not be required to announce their system in advance, and the weighting of such factors as age, training, and breadth of skill would inevitably involve considerable discretion. Unless a great number of employees were involved, the employer would be able to announce his conclusion without having it subject to careful statistical scrutiny. Even when large numbers are involved the use of a post hoc regression formula developed to rationalize the actions taken affords considerable leeway.

If an employer and an employee in a nonunionized context are to be free to set their own terms of employment, much of the legislative protection proposed by Summers may be offset by individual agreements. One of the interesting points about union-management relations is that protections are afforded even though the parties are permitted enormous leeway in setting their own terms and conditions. In the unionized context, the employer may not deal with individual employees, and therefore he may not utilize any advantage in bargaining power over individuals to undercut the protections of the collective-bargaining agreement.

An individual employee without union protection would be vulnerable to harassment to force him to resign, even after a successful grievance. The employee could not relitigate every instance of harassment. As Professor Summers notes, "unfamiliarity with legal procedures and reluctance to become involved in them will deter most employees from litigating when the loss is not substantial."<sup>74</sup>

When a union is on the scene and representation is provided for,

72. *Id.* at 527.

73. *Id.*

74. *Id.*

it is the employer who is likely to be put at a disadvantage by a multiplying number of grievances. Since it is important to a union to maintain the integrity of grievance procedures, any inclination of the employer to retaliate against the employee must be balanced against the desirability of maintaining or developing good relations with the union. The problems of retaliation cannot adequately be dealt with by continuous resort to the legal process.

The NLRB's provision of legal protection against retaliation includes an experienced administrative apparatus, yet research indicates that most discriminatorily discharged employees either do not, in fact, return to their jobs, or, if they do, are soon forced to leave.<sup>75</sup> Fear of retaliation and harassment are the main reasons for leaving.<sup>76</sup> Although the Board's procedures are excellent and its formal remedial power great, it is unable to prevent harassment or discrimination.

## 2. *Availability and Neutrality*

As Professor Summers realizes, special procedures for selection and payment of the arbitrator would have to be devised to make arbitration feasible outside of the bargaining context.<sup>77</sup> An arbitrator would have to be supplied by the state to make the process affordable to the grievant and fair to the employer. A system of private selection would be disadvantageous to employees, since an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process.

## 3. *Efficiency and Finality*

Private selection would also probably hinder the arbitrator's ability to work for a settlement. Judges who are not beholden to the parties, who do not need their good will for future employment, and who are concerned about delays and crowded dockets frequently employ very

75. See J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN & E. SILVERSTEIN, *COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT* 313-17 (1978) (summarizing findings of study conducted by Leslie Aspin).

76. *Id.* at 314-15.

77. See Summers, *supra* note 21, at 523-32 (discussing need for framework for resolving issues as to who has to bear costs of arbitration, what employees and employers are to be covered, what acts constitute justifiable discipline or dismissal, how statutory procedures are to be accommodated with procedures under collective agreements, and scope of available remedies).

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strong tactics to force the parties to settle disputes out of court.<sup>78</sup> A judge, for example, may suggest that the unwillingness of either of the parties to show flexibility will influence his decision. An arbitrator is not in a position to exercise similar pressure, for fear that he may antagonize the parties and jeopardize his future employment. Moreover, the arbitrator is working against his own fee if he settles the case quickly.<sup>79</sup> This fact is not critical in unionized labor relations, because arbitration occurs only after a series of efforts to settle disputes. But the lower steps of the grievance procedure would not be available under the Summers proposal. Thus, governmental assignment of arbitrators to cases without prior party involvement would be desirable because it would increase the arbitrator's ability to work for a settlement.

Unless the state also provided the grievant with an attorney, he would be at a severe disadvantage in dealing with a large institution. Providing arbitrators and representatives would make the process expensive for society. Moreover, the lower steps of the grievance process would be unavailable for settlements, and the development of a cooperative relationship between the grievant's representative and management would be highly unlikely. All of these factors would require creation of an administrative apparatus for promoting settlements and screening claims before providing the grievant with representation.<sup>80</sup>

Since there would be less incentive for either side to treat the decision of the arbitrator as final, judicial review would be more frequent. In addition, if the consensual elements of the process were reduced substantially, there would be less reason for courts to accord great deference to arbitral decisions on review. Arbitrators under this system would have less incentive to try to please both sides, and split awards would be less likely. Thus, since the process would lose those elements related to collective bargaining, it would come to resemble the NLRB more than it would resemble current labor arbitration. However it evolved, for reasons already suggested, it is unlikely that such a system would be as efficient as successful labor arbitration or would achieve the same degree of obedience.

The evolution I predict under Professor Summers's proposal underlines the difficulty of defining arbitration outside of a particular context. As already noted, the private aspects of labor arbitration—the

78. See Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 557-58 (1978) (functioning of pretrial-conference mechanism by which trial judge acting as autocratic decisionmaker compels settlement and eliminates trial).

79. Arbitrators are paid on a per diem basis. See R. FLEMING, *supra* note 24, at 37-40.

80. See Summers, *supra* note 21, at 524 (need to screen out frivolous claims and suggesting this may be done by requiring grievant to bear portion of costs).

private source of the rules being applied, the technique for selection and payment of arbitrators, the interrelationship of arbitration with the lower levels of the grievance system, and the use of arbitration as a technique for the application of economic pressure—are all rooted in its relation to collective bargaining. Proposals lacking these features would produce a type of arbitration almost indistinguishable from agency adjudication. Professor Summers's proposal and others like it envision or would lead to decisionmakers who would be described as "arbitrators," but would be selected by government, would apply officially established rules, and would make enforceable decisions concerning the lives of people compelled to use the system.

### B. *Prison Disputes*

The continuing interaction between labor and management gives arbitration its shape and meaning. Group relations that are simultaneously adversarial and interdependent are most closely akin to the labor experience and therefore seem to have the greatest potential for the establishment of a similar system of dispute resolution. Perhaps the most interesting analogy is to prisons.<sup>81</sup> In both areas, the dominant group depends on the cooperation of the subservient group to maintain control. In the absence of formal bargaining, tacit bargaining becomes a significant process for resolving conflict. In both areas, deterioration of relations may lead to mutually destructive conflict. Arbitration in each situation is simultaneously a substitute for combat and for litigation.

However, because prison authorities would continue to have the power to define the rules being applied and the scope of the arbitrator's authority, arbitration modeled on the labor experience would lack the features of finality, neutrality, and fairness, and would provide less guidance and be less efficient than labor arbitration. As a result it is unlikely to lead to a basic restructuring of relationships or to the development of a meaningful internal system of law.

#### 1. *Current Experiments*

A more favorable appraisal of prison arbitration's potential is suggested in a series of articles written by people involved with current

81. Several observers have advocated that prisons implement grievance procedures similar to those of labor. See, e.g., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 13 (1967); Address by Chief Justice Warren E. Burger to the National Conference of Christians and Jews, Philadelphia, Pa. (Nov. 16, 1972), quoted in Singer & Keating, *Prison Grievance Mechanisms: A Better Way than Violence, Litigation, and Unlimited Administrative Discretion*, 19 CRIME & DELINQUENCY 367, 369 (1973).

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programs.<sup>82</sup> Experiments with advisory arbitration are proceeding in New York, South Carolina, and California prisons.<sup>83</sup> Arbitration has been used for some years by the California Youth Authority after an experiment at the Holton School.<sup>84</sup> An influential report on the Holton School experiment described it as "exceeding all expectations for its success."<sup>85</sup> The report also concluded that the experiment with arbitration demonstrated that, with only minor changes, the labor model could be successfully transplanted to the general prison environment.<sup>86</sup>

The details provided concerning the operation, however, suggest that the program functioned far differently than labor arbitration. Since the arbitrator's opinions were only advisory, obedience was not required. The awards were general in nature, and several that apparently sustained grievances actually returned the issues to the staff for the exercise of traditional supervisory discretion.<sup>87</sup>

Although arbitrators under the California program have jurisdiction to consider questions of institutional policy,<sup>88</sup> they do not appear to have significantly challenged basic institutional regulations.<sup>89</sup> The one rule that bore an obvious relation to security was upheld.<sup>90</sup> In the one case in which the arbitrator denied the security claim, the award was not followed.<sup>91</sup> The report concedes that the arbitrator's "attempts to grapple with . . . grievances involving policy have not always been successful."<sup>92</sup>

There is another reason why it would be a mistake to attribute too much credibility to the enthusiastic report of the first-year experiment at the Holton School. During the first period of such a program, small changes can be significant symbolic victories to inmates unaccustomed to playing an officially recognized role in institutional grievances. After a while, though, the inmates may become more demanding and the guards more resistant.

82. See, e.g., Keating, *Arbitration of Inmate Grievances*, 30 ARB. J. (n.s.) 177 (1975); C. Bethel & L. Singer, *Successful Inmate Grievance Procedures: How and Why They Work* (undated manuscript from Center for Community Justice).

83. See Breed, *Administering Justice: Implementation of the California Youth Authority's Grievance Procedure for Wards*, 10 LOY. L.A. L. REV. 113, 125 (1976).

84. See Keating, *supra* note 82, at 182.

85. Keating, *supra* note 82.

86. *Id.* at 179.

87. See *id.* at 183-88.

88. *Id.* at 186.

89. Even minor changes were made tentatively and were subject to staff approval. See *id.*

90. *Id.* at 185 ("out count" policy).

91. *Id.* at 189 (award upholding First Amendment right to display Nazi emblem rejected).

92. *Id.* at 186; cf. Note, "Mastering" Intervention in Prisons, at pp. 1079, 1081 *infra* (masters face similar limitation in attempting to solve systemic problems through case-by-case adjudication).



## 2. *The Differing Role of Prison Arbitration*

No matter how his role was structured, it would be almost impossible for an arbitrator in a prison to exercise the degree of oversight concerning the conduct of prison officials that labor arbitrators exert over management. Goals of fairness and neutrality would be difficult to achieve and they would have to be redefined in the prison context.

### a. *Absence of Neutral Standards*

An arbitrator dealing with the legitimacy of a prison rule in a tense prison situation is in a difficult position. Arbitration would be a poor forum for adjudication of constitutional or other legal questions<sup>93</sup> and, if the dispute is not to be adjudicated by applying public law, it is difficult to develop adequate neutral standards of decision. There is no private law, as in the case of union and management relations, arising out of formal bilateral bargaining and contractual obligations. There are prison rules, but these are unilaterally promulgated and subject to change. They generally delegate considerable authority and discretion to prison authorities. Because of the importance of maintaining order in prison and the vulnerable position of outnumbered guards, arbitrators have to respect regulations defining infractions broadly and give officials broad discretion in the determination of penalties. In the absence of official rules, the arbitrator's judgment either must rest on traditional methods of prison governance, a "common law of the shop" that is unlikely to accord much status to the prisoner grievants, or must involve considerable discretion and intuition. Awards based on such ill-defined standards will not have the legitimacy that comes when a decisionmaker is perceived to be applying standards not of his own making.

If he considers a prison rule improper, the arbitrator must decide whether simply to suggest its abandonment or to suggest an alternative. Either course of action creates problems. The former may either leave prison officials confused about what to do or permit them to reinstate their former policy; the latter may involve the arbitrator in questions

93. Arbitration is not a good technique for applying external law to prisons. Effective legal decisions depend on constitutionally acceptable factfinding procedures. Unless the procedure is fairly formal, the arbitrator is knowledgeable about the law, and both sides are represented by lawyers, a legal issue will be neither well presented nor well decided and thus will be vulnerable to a subsequent legal challenge. Because appeal to the courts is available, important issues may remain undecided for a long time. Such a process would be very expensive and time consuming. It is difficult to see any way in which such a use of arbitration would improve on the use of special masters, which offers greater flexibility and greater access to the authority of a federal judge. See generally Note, *supra* note 92.

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of administration beyond his competence. If an arbitrator became deeply involved in creating rules, prison administrators might seek to impose more stringent limits on his ability to overturn prison practices.<sup>94</sup> Any arbitrator who attempted to force major changes opposed by administrators would probably become unacceptable to the prison, and therefore to the state, acting as the appointing authority.<sup>95</sup>

The arbitrator would also have to consider whether he should require officials to justify their conclusions about security needs and whether it is legitimate for him to consider priorities in the allocation of scarce resources. An activist approach might undercut official authority and create a danger of disorder and a possibility of the prison staff turning against the program.

### b. *Problems of Legitimacy*

One of the major differences between prison grievance programs and labor arbitration is that the success of the former almost totally depends on acceptance and support by prison officials. The best-informed advocates of prison grievance systems recognize that "the attitude of the superintendent is critical in determining whether an institution's procedure will be successful."<sup>96</sup> Labor arbitration by contrast can function successfully even if disapproved of by management so long as management is willing to agree to an arbitration clause in the contract. Once arbitration is contractually mandated, management cannot unilaterally terminate the process and attempts to do so through bargaining would generally provoke a strike. Prison arbitration, since it is unilaterally established, can be unilaterally terminated.

One would therefore expect prison arbitrators to be extremely cautious and reluctant even to suggest significant changes in important rules favored by prison officials. One would also expect official limits on an arbitrator's authority to reject prison rules. Thus, if one assumes

94. See J. KEATING, PRISON GRIEVANCE MECHANISMS 30 (1977) ("Administrators and line staff alike worry . . . that decisions detrimental to security will be dictated by inmates and/or by 'outsiders' acting as outside reviewers."); cf. Note, *supra* note 92, at 1067 ("Members of the prison community who benefit from the current structure [of decision-making] are likely to resist efforts to reduce their control.")

95. But cf. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 398 (1978) ("Most prison authorities have preferred to purchase order by sharing some of their power with inmates . . .")

96. C. Bethel & L. Singer, *supra* note 82, at 10; accord, Breed, *supra* note 83, at 116 ("unqualified commitment" of superintendent "a *sine qua non* for a successful procedure").

The acquiescence of inmates is also of crucial importance. See C. SILBERMAN, *supra* note 95, at 403 (prison government depends on inmate consent); cf. J. KEATING, *supra* note 94, at 10-11 (importance of grievance mechanism appearing credible to inmates); Note, *supra* note 92, at 1074 (judicial intervention depends for efficacy on willingness of all parties to participate).

that the rules currently applied do not recognize legitimate prison interests, arbitration is unlikely to change this state of affairs substantially.<sup>97</sup> Such a system, in which the decisionmaker has greater incentive to please one side than the other, is unlikely to achieve neutrality or fairness.

c. *Lack of Protection Against Reprisals*

Arbitrators in prisons currently do not deal with the imposition of penalties.<sup>98</sup> If they did, many of the problems with respect to obedience to awards, discussed in relation to nonunionized industries, would arise. Prison officials would be able to avoid the general impact of unfavorable rulings by changing their own regulations. The successful grievant would be vulnerable to reprisals through a variety of subsequent contacts in which he would deal with the same officials.

Because of the number of situations in which prison officials make discretionary decisions about important aspects of the prisoners' lives, it would be difficult to prevent either the incident that led to the imposition of punishment or the filing of a grievance from being used against an inmate. Various forms of reprisal might be taken that would not easily be characterized as punishment.<sup>99</sup> In addition, it would often be difficult to remedy the improper imposition of punishment, since the punishment would often be administered before the grievance machinery could operate.

In sum, introduction of arbitrators into prisons would not change the fact that all processes will have to be subordinated to the overriding goal of maintaining order.<sup>100</sup> This goal not only limits how the arbitrator will decide, but also what corrections officials will accept.

97. It is possible that grievances will be filed by inmates seeking protection against other inmates. Such grievances would have great appeal in arbitration; permitting powerful inmates to terrorize weaker ones in violation of the rules is unacceptable. To respond adequately, though, arbitrators would have to require stricter enforcement of prison regulations, and this might create the perception that the process is just another technique for imposing discipline.

98. Telephone Interview with George Nicolau, V.P. & Exec. Dir., Institute for Mediation and Conflict Resolution (Mar. 15, 1979).

99. See J. KEATING, *supra* note 94, at 11 ("Fear of reprisal is the objection to grievance mechanisms most often voiced by inmates.") See generally C. SILBERMAN, *supra* note 95, at 399 (trade-offs and bargains between guards and inmates characterize prison life); Note, *Bargaining in Correctional Institutions: Restructuring the Relation between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 728 (1972) (inmates and guards interact through "an ongoing informal bargaining process").

100. Cf. Note, *supra* note 99, at 729 ("[W]ithin the day to day bargaining process often the only goal sought . . . by the institution is short term surface order—the semblance that everything is running smoothly with no official (or public) cause for alarm."); Rutherford, *Formal Bargaining in the Prison: In Search of a New Organization Model*, 2 YALE REV. L. & SOC. ACT. 5, 7 (1971) (describing equivalent concept of "surface placidity").

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### d. *Conflict with Guard Unions*

The interests of higher prison officials and guards generally coincide,<sup>101</sup> since both seek to achieve order and to minimize the possibility of disruption. In addition, the guards have a special interest in maintaining their own authority over the inmates. They are often unionized<sup>102</sup> and they have the ability to resist limitations on their traditional powers and to insist that an arbitrator dealing with prison grievances recognize the supremacy of their contractually negotiated rights. When guards are unionized, they will almost inevitably have greater bargaining power than inmates and any grievance system developed will reflect this fact. Moreover, the institution of a grievance system for inmates is likely to serve as an incentive for guards not already organized to do so. Thus, the standards applied in resolving prison grievances will inevitably reflect the interests and priorities of prison guards, and arbitrators will not be permitted to exercise the stringent control over management decisionmaking in prisons that they have in labor relations.

### 3. *Can the Model of Collective-Bargaining Arbitration Work in Prisons?*

Grievance machinery coupled with formal collective bargaining would have greater potential than arbitration alone for changing the nature of the prison environment. However, since collective bargaining would have to change substantially from the labor model to make sense in this context, it would not have the same impact it has in labor relations.

It is difficult to determine what the potential for collective bargaining is in prisons. Inmate organizations are common, but their scope is narrow. They rarely deal with significant questions of institutional governance and do not engage in collective bargaining leading to enforceable agreements.<sup>103</sup> The primary form of bargaining in prison continues to be indirect, individual bargaining of a type that favors those most capable of causing disruption. Certain individuals who have the capacity to create serious disorder are granted favored treatment in

101. *But see* J. KEATING, *supra* note 94, at 30 (prison staff may oppose a grievance mechanism because it enables administrators more closely to monitor their job performance).

102. *See* J. JACOBS & N. CROTTY, *GUARD UNIONS AND THE FUTURE OF PRISONS* 6-8 (1978) (Institute of Public Employment Monograph No. 9).

103. *Cf. Paka v. Manson*, 387 F. Supp. 111 (D. Conn. 1974) (inmates have no constitutional right to organize union).

exchange for their cooperation in maintaining order.<sup>104</sup> A more formal bargaining process might create a sense of fiduciary obligation on the part of the prisoners who engage in negotiations with prison officials. If the tacit bargain of cooperation in exchange for decent treatment were made explicit, more prisoners might identify their interests with the maintenance of order, and prisons might work more efficiently and equitably.<sup>105</sup>

The California Youth Authority experiment included procedures for settling grievances prior to arbitration that might be seen as creating explicit bargaining. A grievance was first presented to a committee consisting of two inmates, two staff members, and a nonvoting, middle-management chairperson.<sup>106</sup> If the committee failed to achieve a settlement, an appeal to the superintendent or the director could be taken.<sup>107</sup> The great majority of cases did not reach arbitration,<sup>108</sup> a fact hailed in the report as proof of "the success of ward participation and mediation in resolving problems at the lowest level of the procedure."<sup>109</sup> This claim is not substantiated, however, because we do not know how the grievances were resolved, how many were turned down by the superintendent,<sup>110</sup> or why inmates who might have had grievances partially or wholly rejected did not go to arbitration. Nevertheless, it seems likely that such mechanisms constitute a form of collective bargaining in which some prisoners or wards acting in a representative capacity attempt to convince institutional officials of the wisdom of changing policies or of satisfying individual complaints. This form of bargain-

104. C. SILBERMAN, *supra* note 95, at 399; Note, *supra* note 92, at 1065; Note, *supra* note 99, at 738-41; cf. J. KEATING, *supra* note 94, at 28 ("The principal alternative to repression in virtually every correctional setting is a form of informal and unofficial bargaining based on the mutual recognition by staff and inmates of each other's power to make things [sic] difficult in the event of a breach of terms.")

105. See C. Bethel & L. Singer, *supra* note 82, at 3. The opportunity for prison input under the arbitration model would serve rehabilitative goals by promoting prisoner dignity and self-respect, see Note, *supra* note 99, at 751-53, while remaining true to the values of the emerging "justice model," see generally J. KEATING, *supra* note 94, at 23. It could thus alleviate the sense of alienation and powerlessness fostered by the capricious and arbitrary functioning of a system of tacit bargaining. See *id.* at 31; Note, *supra* note 99, at 741.

106. Keating, *supra* note 82, at 181.

107. *Id.*

108. Keating, *supra* note 82, at 182 (only six cases had been referred to arbitration); Keating, *The Justice Model Applied: A New Way to Handle the Complaints of California Youth Authority Awards*, 10 LOY. L.A. L. REV. 126, 147 (1976) (as of early 1976, with procedure operating throughout California youth system, only one percent of all cases were appealed to outside review).

109. Keating, *supra* note 82, at 182.

110. But see Keating, *supra* note 108, at 146 (relief requested by grievant was granted in whole or in part in 68.1% of cases).

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ing informs prison officials of inmate attitudes and provides an opportunity for rational discussion. Thus, the lot of the ordinary inmates who normally do not have a forum for the expression of their views may well be improved.<sup>111</sup> It is possible that the major contribution of grievance mechanisms in prisons will not be the establishment of a system of external review or the creation of an internal legal system, but the provision of a means for prisoner representatives and staff to discuss mutual concerns in an atmosphere relatively free of coercion or confrontation.<sup>112</sup>

However, such a style of collective bargaining would not lead to substantial change: prisoners would not be able to apply economic pressure by withholding work if their demands were not met. Although prisoners do have the ability to disrupt the prison through violence and refusal to cooperate,<sup>113</sup> the use of such tactics would create strong pressures from guards and the public to eliminate any explicit bargaining process. Only the prospect of minimizing violence and disorder can make collective bargaining acceptable to the public and prison officials,<sup>114</sup> both of whose approval is probably necessary to the establishment or maintenance of such a program. The resources available for prisons would not be dealt with through such bargaining, so collective bargaining cannot create additional benefits for inmates.<sup>115</sup> Discussions might deal with how limited resources intended for prisoner

111. See Note, *supra* note 99, at 750 (mediation model may "serve as a vehicle for airing grievances in public"). Mediation may thus channel the frustrated desire to be heard that frequently underlies prison revolt. See J. KEATING, *supra* note 94, at 5-8 (grievance mechanism necessary to avoid prison violence); Singer & Keating, *supra* note 81, at 376 (arbitration may serve to avoid prison violence).

112. See J. KEATING, *supra* note 94, at 18 ("An effective grievance mechanism can break the log-jam of communications and provide a means of destroying the control over information flow currently enjoyed by line staff."); cf. C. SILBERMAN, *supra* note 95, at 422 (importance of communication between inmates and prison staff). The atmosphere induced by a grievance mechanism would thus stand in marked contrast to the adversarial climate fostered by more traditional judicial proceedings. See C. Bethel & L. Singer, *supra* note 82, at 2; Note, *supra* note 92, at 1082-84.

113. Cf. Note, *supra* note 99, at 744 ("bargaining ability depends upon maintaining the highest possible threat of disruption and violence by the inmate society").

114. See Keating, *supra* note 82, at 190 ("As the cost of violence and litigation in corrections escalates, more and more correctional administrators, like their employer counterparts before them, are becoming increasingly receptive to new ways for handling legitimate grievances.")

115. Cf. Note, *supra* note 92, at 1067 ("public officials are often unwilling to allocate funds necessary to provide adequate resources"); Note, *supra* note 99, at 736 (political process "will provide the minimum amount of enforcement resources necessary to satisfy its demands for security (as well as the treatment of offenders)"). Arbitration may, however, more efficiently use the resources already available to prisons. See J. KEATING, *supra* note 94, at 16 ("One of the most important reasons for adopting an effective grievance mechanism is the potential improvement in management it can bring to an institution or program.")

use should be allocated, but prison officials would have their own views and the final say.

There is little reason for prison officials to place any agreement reached in a formal contract.<sup>116</sup> Making the relationship contractual implies a level of equality between inmates and officials that officials would probably resent and that prisoners could not enforce. There would be no important return promise similar to the no-strike clause, and official contractual relations between prisoners and inmates might conflict with collective-bargaining agreements between employee unions and state officials.<sup>117</sup> Thus one would expect the results of a bargain to be cast in the form of an official policy statement rather than a contract.<sup>118</sup>

Labor arbitration reflects the fact that unions under a system of collective bargaining have a significant, almost equivalent, voice in establishing the ground rules of industrial life. Prison arbitration, on the contrary, must recognize that correctional policy requires acknowledgment of the supremacy of prison officials and of the need for maintaining order. Because of this fact, the grievance system would not stand neutral between those in power and those who bring grievances. A technique of dispute resolution based on interpreting agreed standards cannot simply be transferred to a situation of paramount inequality that lacks an accepted procedure for establishing mutually acceptable rules.<sup>119</sup>

116. See Keating, *supra* note 82, at 186 ("The absence of a contract in any meaningful sense in corrections means that the definition of a 'grievance' is virtually unlimited.")

117. The conflict is different when an employer deals with two unions. Each union would usually have its exclusive areas of jurisdiction. In prisons, both groups would be dealing with the same matters. In addition, when conflict existed, inmate groups could not claim equality.

118. Cf. Keating, *supra* note 82, at 185 ("Characteristically, awards in policy cases have outlined the framework of a suggested new policy and recommended its adoption on a 'pilot' basis for a specified period of time.")

119. Arbitration has been suggested for certain disputes between individuals who do not have a continuing relationship, such as lawyers and clients. In such circumstances, the labor model is obviously inapposite. There is no need for precedent, or a careful selection process, no point to having the parties pay for the arbitrator, and no reason for the arbitrator to decide in terms of the parties' priorities or to give split awards. There is also no reason, other than cost to the parties, to avoid appeals, and no collective agreement to ensure obedience to an award requiring a further course of conduct.

Arbitration of such cases may nevertheless have advantages over formal adjudication. It may be similar to a small claims court, with the additional advantage of special expertise. On the other hand, arbitration by nonlawyers may involve the loss of procedural regularity and legal rights. If lawyers are used, the difference from a special court seems minimal.

Some of the disputes that the AAA is attempting to deal with through a combination of arbitration and mediation are between individuals or groups who have a continuing

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### Conclusion

To understand labor arbitration one must understand its complex relationship with other aspects of collective bargaining. Through labor arbitration the parties continue and refine their bargaining. Their agreement takes on a more precise meaning, and issues not dealt with during formal negotiations are resolved in a way likely to recognize their interests and priorities. This process is enhanced by the system of private selection of arbitrators. The private aspects of the process make arbitrators less able than judges to facilitate prelitigation settlement, but this is relatively unimportant because settlement is achieved through the lower steps of the grievance system.

The constant focus on the informality of arbitration is misleading. The procedures used vary, but they frequently involve presentation of cases through lawyers, oaths, subpoenas, transcripts, briefs, and carefully written awards following a common form and citing precedent. The entire process serves to legalize the administration of a unionized enterprise to a remarkable extent.

Labor arbitration also serves as a mechanism by which unions that have given up the right to strike can apply pressure on employers during the term of an agreement. This feature, which increases the value of arbitration to unions, occasionally makes it a source rather than a substitute for conflict.

The collective-bargaining relationship and the collective agreement give considerable power to arbitration awards. Primarily they provide the substantive standards to be applied and make the results acceptable to the parties. Because both sides develop a strong interest in the smooth functioning of the process, arbitration awards are routinely obeyed and infrequently challenged. The other provisions of the agreement serve to protect the integrity of the process. Because they limit managerial discretion they make it difficult to undercut the impact of an unfavorable award through retaliation.

relationship. In such cases, arbitration is suggested because the currently available legal remedies are too adversarial and involve delays permitting the issues to smolder.

The issue being addressed by community dispute-resolution programs is an important one because it involves an attempt to harmonize the exercise of formal adjudicatory power with efforts at conciliation. For the arbitrator to be successful, he must be able to deal with the legal aspects of the case while also utilizing his position to promote an acceptable settlement. This is not a role commonly played by labor arbitrators. There is little institutional expertise about how the two roles can best be combined in individual cases, nor is there any reason to believe that private processes lend themselves to such an approach better than public decisional processes. The labor-arbitration process, with its statements of issues, adversary proceedings, professional representatives, formal opinions, and the constant contractual reminder to the arbitrator to limit himself to interpretation of the agreement, provides a poor means of resolving personal conflicts.



The interconnection between labor arbitration and collective bargaining means that grievance systems in other situations without this feature will be vastly different. The private aspects of labor arbitration that have served to make it attractive to commentators are likely to be a hindrance in nonunionized contexts in which collective bargaining does not take place. Protection for nonunionized workers, for example, probably requires more direct government involvement, and even then it is unlikely to achieve the same results as are achieved by the combination of collective bargaining and labor arbitration in the unionized sector.

Prisons have some of the attributes of labor relations and some preliminary efforts to establish grievance mechanisms have been undertaken. Such mechanisms have the value of permitting inmates and officials to engage in a useful process of quasi-bargaining in dealing with grievances, but the process is, and will eventually remain, significantly different from labor arbitration. Any collective bargaining in prisons must recognize the overriding need for security and the fact that a prisoner's relationship to institutional officers is not intended to be one of equality.

In prison and elsewhere, arbitration has developed along lines different from the labor experience. The idiosyncratic development of arbitration experiments might lead some to conclude that one need not be overly concerned with the inappropriateness of the labor model. Each new form of arbitration may be expected to develop according to the special needs of the particular area. If the labor model helps to inaugurate more flexible systems of justice, a useful purpose is served, even though the model is inapposite and the new processes are less successful in achieving various goals.

A realistic understanding of labor arbitration is nevertheless important. It helps to set a realistic agenda for reform because it reminds us that systems of dispute resolution can play only a limited role in affecting relationships that are shaped by powerful economic and social forces. Throughout labor relations there is a tendency to exaggerate the importance of adjudication. Those who devise the rules and administer the process are the ones who are most likely to describe their work in print and to exaggerate its significance. Their roles are easier to study for legal scholars and political scientists than are the intricate processes of union organization, contract negotiation, and grievance settlement. This gives greater salience to the role of decision-makers and helps create a body of partially informed opinion focusing on one part of a complex process. Labor arbitration has been particu-

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larly vulnerable to this problem. Much of the writing describing and evaluating it has come from practitioners whose professional egos are intertwined with the success of the process. In addition, prestigious groups such as the American Arbitration Association and the National Academy of Arbitration, through their publications, conferences, and reports, have acted as advocates for arbitration. Their literature has suggested that a clear line exists between arbitration and adjudication; it has also suggested that labor arbitration has been more successful in achieving industrial peace than any careful investigation suggests. In claiming success for labor arbitration, these groups have tended to overlook or downplay the crucial significance of union organizing and the collective-bargaining context.